

B. The Commission Must Maintain Enforcement Mechanisms Regardless of ILECs' Chosen Avenue for Providing xDSL Services.

There are three possible scenarios that could result from the Commission's implementation of an affiliate option. First, ILECs could reject the affiliate option and deploy services themselves. Second, ILECs could establish advanced services affiliates that are truly separate and function as CLECs. Third, the ILEC could create an advanced services affiliate that benefits from ILEC partiality and anticompetitive behavior despite the Commission's affiliate safeguards.

The third scenario requires action by the Commission. While the Commission's affiliate option can remove the Section 251(c) requirements in order to incentivize ILECs to offer advanced services, the Commission should not eradicate the fundamental non-discrimination principles of the Act, and therefore must include an enforcement mechanism, similar to Section 271 of the Act, that will keep the ILECs' partiality in check. The Commission has already recognized that such an enforcement scheme might be necessary. "[I]f the advanced services affiliate derives an unfair advantage from its relationship with the incumbent, that affiliate should be viewed as stepping into the shoes of the incumbent LEC and would be subject to all of the requirements that Congress established for incumbent LECs."¹⁸ Thus, if an ILEC treats its own affiliate and competing CLECs in a disparate manner, or if an affiliate in any other way derives an unfair advantage from its relationship with an ILEC, that affiliate should be subject to unbundling and resale obligations. That is, CLECs aggrieved by disparate treatment as a result of the ILEC-affiliate relationship should be entitled to resale of advanced services from the affiliate.¹⁹ If an incumbent LEC attempts to prevent new entrants from providing competitive advanced

¹⁸ NPRM ¶ 40.

¹⁹ Resale of advanced services will be available from the ILEC, if the ILEC has not transitioned its advanced services to its affiliate.

services by giving those new entrants disparate access to UNEs and collocation, then the ILEC should have to ensure that the new entrants are able to offer advanced services by reselling the advanced services of the affiliate.

Moreover, the Commission should follow through on its intentions to make clear that, regardless of the avenue chosen, there are certain requirements for competition that incumbent LECs are obligated under the Act to follow. NPRM ¶ 84. “In this NPRM, we also propose additional rule changes that would apply whether or not incumbent LECs choose to establish a separate affiliate to provide advanced services. We propose rules to ensure that all entities seeking to offer advanced services have adequate access to collocation and loops, which is critical to promote competition in the marketplace for advanced services.” *Id.* As discussed in full in the succeeding sections, ILECs must always comply with their obligations under the Act to offer access to UNE’s, including xDSL-capable loops, and collocation in order to ensure the deployment of advanced services.

IV. THE COMMISSION SHOULD ADOPT ITS PROPOSED MEASURES FOR THE PROMOTION OF COMPETITION IN THE LOCAL MARKET

Above and beyond proposing the establishment of an affiliate option for incumbent LECs, the Commission articulates several tentative conclusions and proposed rules regarding the promotion of advanced services competition in the local market. In doing so, the Commission recognizes that true local competition rests far less on questions of investment levels or ILEC participation, but rather on the creation and enforcement of a regulatory means for ensuring equal access by all competitors to the essential facilities of the central office and the local loop. With regard to xDSL-based advanced services, the access necessary for competition is access to

unbundled “clean”²⁰ copper loops and affordable and timely physical collocation. Until parity of access to those two critical inputs is achieved, incumbent LECs will retain a far-reaching competitive advantage vis-à-vis new entrants, and the development of new services and lower prices for consumers will suffer accordingly.

A. Physical Collocation Is Essential to xDSL Competition

The Commission dedicates thirty-six paragraphs of its NPRM to considering and seeking comment on methods for providing competitive LECs access to collocation. NPRM ¶¶ 118-154. By doing so, the Commission clearly demonstrates its recognition that physical collocation is a critical component necessary for the introduction of competition in advanced services via xDSL-based technologies. First Regional and FirstWorld applaud the Commission for its detailed attention to this issue and support the recognition that physical collocation is necessary to “promote competition in the local market.” Id. ¶ 118.

In particular, Commenters support the Commission’s proposed adoption of “additional national collocation rules . . . in order to remove barriers to entry and speed the deployment of advanced services.” Id. ¶ 123. Because incumbent LECs simultaneously control access to the network and currently seek to roll-out their own advanced services, they have both “the incentive and capability to impede competition by reducing the amount of space available for collation.” NPRM ¶ 145; see Comments of DSL Access Telecommunications Alliance (“DATA”), CC Docket No. 98-146 (September 14, 1998) (“DATA NOI Comments”) at 13-15. This dangerous combination has resulted in costly anticompetitive behavior by virtually every ILEC, including flat-out denials of collocation space availability, exorbitant collocation and pre-collocation costs,

²⁰ First Regional and FirstWorld define “clean” as copper loops uninhibited by an abundance of load coils or excessive bridge taps.

and abysmally long build-out intervals. As things currently stand, vibrant participation by new entrants in the xDSL market is directly tied to regulatory relief from the incumbent LECs' iron grip on collocation space.

The adoption of minimal uniform national standards regarding collocation equipment, space allocation and space exhaustion as well as collocation pricing would significantly help to balance the existing lop-sided process by which CLECs currently seek access to the network. Without Commission-determined and enforced collocation rules, competitors seeking to gain access to ILECs central office space are powerless. Even with explicit Commission-issued collocation rules, the threat of a resale obligation is necessary to ensure incumbent compliance. See supra Section III. A combination of national uniform collocation standards, and a resale obligation, however, can have the effect of minimizing the anticompetitive leverage at the disposal of the incumbent LECs and force incumbents and new entrants to compete on price and services, and not on control of the local loop and regulatory indifference.

In particular, the incumbents' advanced services affiliate must be treated no better than other CLECs in order for the affiliate solution to work at all. Collocation is a particularly obvious area where, in the absence of clear rules, an incumbent can readily advantage its advanced services affiliate to the detriment of competitors and competition. Privileged access to previously unavailable space or facilities, or even direct and clear communication about what is or is not available at the central space can provide a winning edge in a new market. The following proposed national rules would ensure that competitors received access to collocation equal to that available to ILEC affiliates.²¹

²¹ The litany of ILEC rebuffs to CLEC equal access is long. See Reply Comments of AT&T Corp., Petitions of Bell Atlantic, US West, Ameritech, CC Docket No. 98-11, at 15 (summarizing the history of comments on this point).

1. Alternative Collocation Arrangements

The Commission suggests, and First Regional and FirstWorld support, alternative collocation arrangements designed to “minimize the space needed by each competing provider in order to promote the deployment of advanced services.” *Id.* ¶ 137. However, these measures — shared collocation cages, no minimum cage size and cageless collocation — represent only incremental increases in actual available collocation space. As discussed in more detail below, the more fundamental solution to the collocation availability problem is to ensure that all available collocation space in the central offices is used for that purpose. The alternative collocation arrangements suggested by the Commission would lower collocation costs and drive more efficient use of existing collocation space, but would do nothing to increase the total amount of that space available to competitors. That is, shared collocation allows more efficient use of existing collocation space allotments by permitting CLECs to team-up to fill-out signal collocation cages rather than each lease their own, but only partially utilize them. However, it does nothing to increase the total amount of space available to competitors — the real issue for competition over time.

Furthermore, alternative collocation arrangements, such as cageless or virtual collocation, often raise security and maintenance concerns. For many competitive LECs, access to the collocation facilities for maintenance is critical. For those competitors competing on the guarantee of high-quality, fault proof service, quick and constant access to collocation equipment is a business necessity. Thus, because virtual and cageless collocation solutions currently deny competitors full access to their equipment, they are not alternatives to traditional physical collocation. Therefore, the Commission should either not rely on those alternatives as viable options for all com-

petitors, or preferably, find that incumbents must provide new entrants with maintenance access for cageless and virtual collocation arrangements.

2. Collocation Charges and Intervals

The Commission seeks comment on other important collocation issues, such as rules for the allocation of up-front space preparation charges, and regulating collocation provisioning intervals. NPRM ¶¶143-144. The financial costs and time delays presently experienced by competitors seeking collocation dramatically burden the entry of competitors into new markets. First Regional and FirstWorld commend the Commission for addressing these issues.

CLECs currently pay as much as \$250,000 above and beyond the “standard” collocation costs to “prepare” central office space for collocation.²² There is no standard for how these costs are calculated, allocated or distributed. Incumbents are generally free to determine who must carry the economic burden for facility improvements that presumably benefit competitors and the incumbent alike. Some ILECs will not even provide a breakdown of the total dollar amount or description of what it buys. In some instances, state commissions have acted to improve matters, for example by requiring CLECs pay only for the conditioning of the actual collocation space requested by that CLEC, a vast improvement over other ILECs who charge competitors to condition an entire room, even if the CLEC will only utilize a subsection of it. *Id.* ¶ 143. However, the Commission should go farther by mandating that each CLEC pay only its share of any charge, and by requiring that incumbents must contract all up-front space preparation work at arm’s length with independent third-party contractors, agreed to by the CLEC requesting the build-out. To prevent incumbents from using this process to further delay colloca

²² Comments of the DSL Access Telecommunications Alliance, CC Docket No. 98-146 (September 14, 1998).

tion, the Commission should require ILECs to make available a list of acceptable contractors in each locale from which competitors can pick. By creating a competitive “market” for collocation build-out this rule should effectively reduce up-front costs to their lowest profitable price while providing incumbents the security of contracting only with known contractors.

The Commission must also work to end the incessant delays that accompany requests for collocation made by CLECs. The Commenters strongly endorse ALTS’ proposal that the Commission should “establish presumptive reasonable deployment intervals for new collocation arrangements and expansion of existing arrangements.” *Id.* ¶ 144. Incumbents currently lack any real incentive to reduce collocation intervals except where specifically pressured by state commissions via the Section 271 process.

The Commission can further speed the collocation process by requiring incumbents to consider CLEC requests and address all pre-interval issues while competitors are going through the state certification and interconnection agreement processes. This step would shave substantial time off of the delays currently experienced by new entrants. Additionally, the Commission should require incumbents to provision high speed transport links to competitors’ Internet points of presence (“POPs”) at retail intervals (currently between 2-3 weeks) rather than the intervals of up to 90 days generally offered to CLECs, and require that these be provisioned in parallel with collocation construction, rather than adding an additional 2-3 weeks onto an already too-long construction interval.

Finally, First Regional and FirstWorld vigorously endorse the Commission’s proposal to set specific maximum intervals for incumbent LECs to provide information on collocation availability and prices and to in fact provision collocation space. *Id.* Competitors regularly waste large amounts of time requesting collocation space at central offices, only to find out subse-

quently that the space required is not available at that central office, often with no indication how much space, if any, is available. There is no operational reason why incumbents could not provide regular reports to competitors listing the space availability at each of their central offices so competitors are not forced to play a guessing game every time they seek to collocate. It is unlikely that incumbents do not have this information readily available for their own internal use, and therefore should be required to distribute it to entrants.

Moreover, when it has been determined that collocation space does exist, and all pre-collocation issues have been addressed, the actual interval for provisioning collocation must be reasonable and relatively consistent. Competitors regularly experience physical collocation intervals ranging up to nine months. By creating a presumptive maximum interval for collocation intervals, the Commission can infuse predictability and fairness into this process. However, the best way to increase collocation intervals is to require incumbents to provision collocation for their advanced services affiliates in the same manner and interval as they provision CLECs, and to require that the affiliate's collocation request not be processed until after all preceding requests made by competitors have been met.

3. Central Office Space Exhaustion

The Commission proposes a number of rules directed at compelling incumbents to provide physical collocation at all available space, and where claims of space unavailability are made by ILECs, to provide a means for competitors to verify that claim. NPRM ¶¶ 145-149. The Commenters believe accurate identification of space exhaustion to be the single most important collocation issue currently faced by competitors. So long as incumbents with a clear economic incentive to deny competitors access to collocation are unilaterally in charge of determining whether or not space is "available," true xDSL-based competition is at risk.

In particular, First Regional and FirstWorld strongly support the Commission's tentative conclusion that it should require an incumbent LEC that has denied a request for physical collocation due to space limitations to not only provide the state commission with detailed floor plans, but to allow the provider seeking collocation to tour the premises, and thus identify space that might be employed to fill the request. *Id.* ¶ 146. First Regional and FirstWorld further urge the Commission to bar incumbent LECs from "warehousing" central office space for future use, particularly by the incumbent's advanced services affiliate, and bar incumbents from using precious central office space for "non-essential" functions, such as accounting, marketing or other tasks that could be as easily performed in other locations as in the central office. The Commission should establish a presumption that use of central office building space for anything other than the incumbent's own switching functions and competitors' collocation needs is not a justification for denial of collocation because of lack of available space.

Further, incumbent LECs should be required to expand the collocation options available to competitors. First Regional and FirstWorld propose that at least the following additional methods of collocation should be made available:

- Adjacent On-Site – The ILEC constructs a structure on the property of the central office and allows carriers to place their equipment in the structure and runs facilities into the central office to the MDF.
- Adjacent Off-Site – The ILEC or the CLEC constructs or rents a space in close proximity to the central office, but off the property and the competitor then obtains copper facilities effectively extending the unbundled loops from the central office to the CLECs off-site location (e.g., entrance facilities).

These collocation alternatives are either in use or are being considered in different jurisdictions, and would expand the physical collocation alternatives to competitors where space is truly in short supply.

B. Access to Clean Copper Loops Is Essential To xDSL Competition

The Commission seeks comment about the existing processes for the provision of unbundled local loops to CLECs to and in particular asks whether it should create additional new national rules regarding ILEC operations support systems, spectrum interference policies concerns and digital line carrier remote terminals. NPRM ¶¶ 151-184. Due to their importance and technical complexity, the latter two issues are addressed separately in these comments. Infra Sections III, IV.

First Regional and FirstWorld generally support the establishment of additional national rules governing the provisioning of local loops pursuant to sections 201 and 251 of the Telecommunications Act. Id. ¶ 154. Despite the Commission's clear order that incumbent LECs must "take affirmative steps to condition existing loops facilities to enable requesting carriers to provide services not currently provided over such facilities,"²³ ILECs continue to deny competitors information about, and access to, copper loops.

Gaining access to precise information about loop availability and physical makeup is one of the most burdensome barriers to competition constructed by incumbent LECs. Incumbents regularly withhold important data regarding the availability and characteristics of loops. If asked for xDSL-capable or "clean" copper loops that carry no load coils and a minimum of bridge taps, incumbent LECs claim they are unable to provide that information. Moreover, ILECs rarely

²³ Local Competition Order, 11 FCC Rcd. at 15689-90, ¶¶ 377-79.

share the results of service tests performed on loops, and often deny loop requests with the simple but uninformative answer, “not available.”

In addition, incumbent LECs often create their own novel definitions for what it means for a loop to be xDSL-capable, and then proceed to deny or limit access to competitors based on those definitions. In doing so, incumbents ignore the loop requirements of competitors, and determine the availability of loops based upon their own arbitrary definitions. Thus, competitors can and are denied loops that do not meet an incumbent’s definition of xDSL-capable, even though the loops in question may perfectly meet the needs of the CLEC. Incumbents manipulate terms such as “loop speeds,” “loop length” and “compatibility” to find reasons not to provide access to their loops. Without national, competition-neutral definitions of loop characteristics, these anticompetitive run-arounds are sure to continue, and CLECs will continue to be prohibited from making independent determinations about whether a loop is appropriate for use.

Beyond simply refusing to provide important data regarding loop type and availability,, incumbent LECs do not currently offer operation support systems capable of efficiently distributing timely loop information. First Regional and FirstWorld further agree with the Commission that where incumbents offer advanced services via a separate affiliate, they “must provide competitors with the same access to OSS as the incumbent provides to its advanced affiliate.”

NPRM ¶ 157.

CONCLUSION

For the foregoing reasons, First Regional and FirstWorld urge the Commission to adopt the regulatory approaches outlined in these Comments. The Commission should promote the build-out of xDSL networks by new entrants as part of its goal to ensure the delivery of advanced telecommunications capabilities to a growing number of Americans pursuant to Section 706 of the Act, but the market alone cannot suffice to do this in the face of the monopoly power of the incumbents. The Commission must be cognizant of the roadblocks now obstructing broadband delivery and therefore take a proactive role in guaranteeing equal treatment and fair play for all competitors if advanced services are to become truly universal.

Respectfully submitted,

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